

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL DUANE WINTON,

Defendant-Appellant.

UNPUBLISHED

April 29, 2003

No. 236850

Wayne Circuit Court

LC No. 00-175043-FC

Before: Hoekstra, P.J., and Smolenski and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of armed robbery, MCL 750.529, and one count of assault with the intent to rob while armed, MCL 750.89. He was sentenced, as a fourth habitual offender, MCL 769.12, to fifteen to forty years' imprisonment for each of his convictions. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for directed verdict because the prosecution provided insufficient evidence. We disagree. When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor up to the time the motion was made, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). "[I]t is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for directed verdict of acquittal, no matter how inconsistent or vague that testimony might be." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Rather, questions regarding witness credibility are left to the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991).

To sustain a conviction for armed robbery, the prosecution must show: "(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001), quoting *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995). To sustain a conviction for assault with intent to rob while armed, the prosecution must show: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant was armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991).

Here, the prosecution presented evidence that on August 4, 2000, two African-American men robbed a store and two of its customers at gunpoint, and, also at gunpoint, attempted to rob a third customer. The taller of the two robbers held the gun. Near the time that the robbers left the store, Paul Baker was stopped at a nearby intersection when he saw two African-American men running across a parking lot while looking over their shoulders. The two men got into a silver, black, and gray Grand Am and drove away. After calling 911 and reporting his observations to the police, Baker followed the car until a responding police car took over pursuit of the fleeing car. The suspects fled into an apartment complex parking lot, and the car chase ended when the Grand Am struck a wall. However, the two suspects managed to flee on foot.

Inside the Grand Am were two headscarves and a brown paper bag containing \$379. The paper bag was similar to the paper bag that the storeowner was forced to give the robbers. A fingerprint on the paper bag belonged to defendant. Also, the store owner and another witness testified that the headscarves found in the Grand Am were the same color and made of the same material as the headscarves worn during the robbery. There was also DNA evidence that defendant's saliva was on one of the headscarves. Finally, defendant's description matched a witness' descriptions of the taller robber's height and skin color. Considering the evidence in the light most favorable to the prosecution, we find that the jury could have been persuaded beyond a reasonable doubt that defendant committed the armed robbery of a store and two of its customers, and assaulted a third customer with the intent to rob while armed. Therefore, the trial court did not err in denying defendant's motion for directed verdict.

Defendant next argues that the prosecution failed to present sufficient evidence of identification to support his convictions because he presented a credible alibi defense and explanation for the forensic evidence. Again, we disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

At trial, defendant presented alibi evidence. Defendant claimed that he was at his girlfriend's house on the day of the robbery and left the house only once between 7:00 p.m. and 8:00 p.m., which was hours after the robbery. His girlfriend testified that defendant drove her home from work at approximately 11:30 a.m., and defendant stayed at her house watching television for the majority of the day. Defendant's girlfriend also testified that he did leave to get food at some point during the day, but returned with food one-half hour later.

Defendant also offered an explanation as to how his fingerprint got on the paper bag and how his saliva got on the headscarf, items found in the Grand Am. Defendant testified that the evening before the robbery, he went to Mark Norris' house to see Quincy Stewart. Norris' mother did not want people inside the house, so defendant, Norris and Stewart sat inside Stewart's car, which was the Grand Am involved in the robbery. While in Stewart's car, defendant drank an ice tea which was inside a paper bag. In addition, defendant had long hair and frequently used a headscarf to keep it lying down. Defendant also testified that he probably loaned one of his headscarves to Stewart.

However, defendant's alibi defense and explanation regarding the forensic evidence found were not airtight and the jury was entitled to reject them. Most significant was Norris'

testimony, where he denied that neither he nor defendant were in Stewart's car on August 3, 2000, undercutting defendant's explanation of how his fingerprint and saliva came to be found on the items retrieved from the Grand Am. Also, defendant's girlfriend testified that she was lying down upstairs most of the day, and that defendant may not have told her that he left. Moreover, defendant's girlfriend lives only two miles from the store that was robbed and the witnesses' descriptions of the taller robber holding the gun matched defendant's description. The prosecution need not refute every theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It need only prove, in the face of contradictory evidence, the elements of the charged offenses beyond a reasonable doubt.

Defendant also highlights several evidentiary inconsistencies and contends that reasonable inferences consistent with guilt could not be drawn from these facts. However, defendant is mistaken. The store owner testified at trial that he put the money in a No. 8 bag, but testified at the preliminary examination that he used a No. 5 bag. The store owner explained that he normally would reach for a bag with his right hand, to which the No. 5 bag was the closest, but he remembered that the robbers made him keep his right hand on the counter, and he grabbed a No. 8 bag with his left hand, which was the closest. Further, defendant notes the discrepancies in the witnesses' descriptions of the robbers. Credibility is an issue for the jury. *People v Lemmon*, 456 Mich 625, 637; 476 NW2d 129 (1998). It was free to accept or reject, in whole or in part, a witness' testimony.

Also, the difference in ink color between the bag found in the car and the one the store owner brought from his store the day of trial had a reasonable explanation. The store owner explained that the ink color on a particular size bag varied with every order he placed. The store owner further testified that he gave the robbers a little over \$1,400.00, but only \$349.00 was found in the paper bag inside the getaway car. We believe that the jury could reasonably infer that the robbers took part of the money with them when they fled the vehicle.

While none of the evidence in itself was conclusive of defendant's guilt, taken together the jury could have reasonably concluded that defendant was one of the robbers. Therefore, we find, viewing the evidence in the light most favorable to the prosecution, that there was sufficient evidence for the jury to find beyond a reasonable doubt that defendant committed the charged offenses.

Defendant last raises two sentencing issues. Since defendant committed these offenses on August 4, 2000, the legislative sentencing guidelines apply. MCL 769.34(1). Defendant first contends that twenty-five points were incorrectly scored for offense variable 13. Because defendant objected at sentencing, the issue is properly before us. MCL 769.34(10).

MCL 777.43 provides that twenty-five points should be scored for offense variable 13 where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." Defendant correctly notes that none of his prior convictions were for crimes against a person, but incorrectly states that only prior convictions are scored. The guidelines instruct that the sentencing offenses are also counted. MCL 777.43(2)(a). Defendant asserts that the scoring is not justified because the armed robberies occurred as part of a single transaction. We disagree. Despite occurring within a short time frame, three individuals were robbed at gunpoint. Therefore, the court correctly scored twenty-five points.

Defendant also argues that his sentences are disproportionate. We disagree. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to fifteen to forty years' (180 to 480 months) imprisonment for each of his convictions. Defendant's sentencing guidelines range for each of his convictions was 126 to 420 months' imprisonment. A sentence within the guidelines range is valid absent unusual circumstances, which defendant has failed to articulate. *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). Further, given the seriousness of the crimes we believe the sentences are proportionate. We reject defendant's contention that the strength of the evidence against him, or, in his belief, the lack thereof, warrants resentencing.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski

/s/ Karen M. Fort Hood